IN THE

Supreme Court of the United States

October Term, 1948

No. 432

E. E. SWALLEY,
Petitioner-Plaintiff,

vs.

ADDRESSOGRAPH-MULTIGRAPH CORPORATION,
Respondent-Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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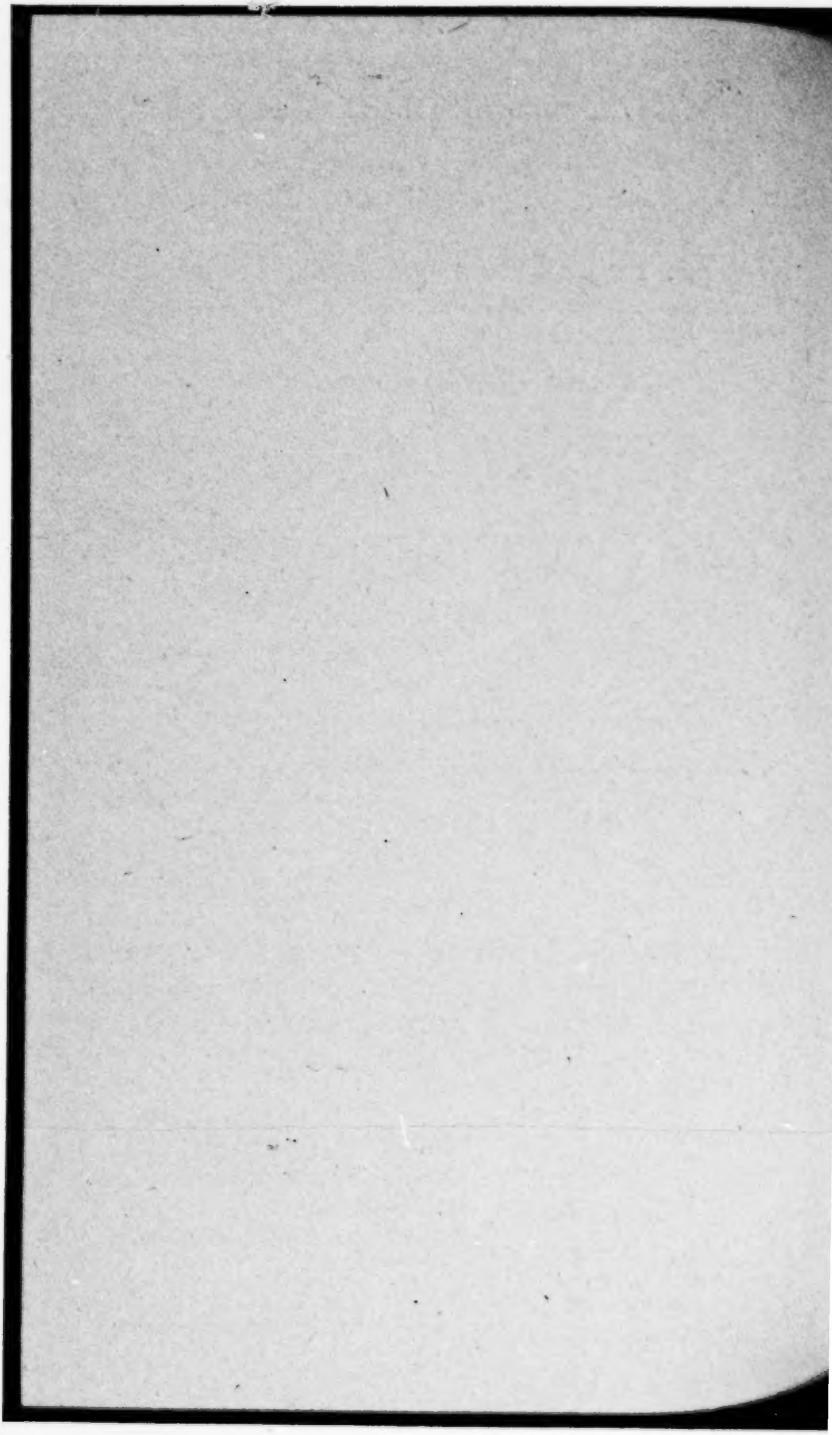

SUBJECT INDEX

TABLE OF CASES CITED

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review the judgment of that Court entered in this case on June 2, 1948, (R. 61), affirming a judgment of the United States District Court for the Northern District of Illinois, Eastern Division (per Igoe, D. J.) in favor of the Respondent-Defendant with costs of $4,269.33 taxed against Petitioner-Plaintiff. (R. 11, 26).

A petition for rehearing was duly filed by Petitioner in the Circuit Court of Appeals on July 2, 1948 (R. 62), and was denied by that Court on July 13, 1948 (R. 68). On motion of Petitioner, this Honorable Court, on October 8,

1948, extended the time for filing the petition for writ of certiorari in this cause to and including November 25, 1948.

A certified transcript of the record in this case, including the proceedings in both the District Court and the Circuit Court of Appeals, is furnished herewith in compliance with Rule 38 of this Court.

Summary Statement of Matters Involved

This is an action to recover commissions due under a written contract between the parties hereto, wherein Petitioner-Plaintiff was appointed the exclusive sales agent of the Respondent-Defendant Company for the State of Alabama and part of Florida. The contract was a printed form contract prepared by Defendant, and provided, *inter alia*, that the agent would be credited with his commission at the time of shipment, and that the law of Ohio shall govern the contract. Defendant contended that the machines in question were not being used, and for that reason Plaintiff is not entitled to recover. The case was tried without a jury by District Judge Michael L. Igoe, who made certain findings of fact and entered judgment in favor of the Plaintiff in the sum of $77,328.65 (Case No. 44-C-413). The Court held that the machines, in fact, were being used by the Army as it saw fit, that the word "use" cannot be restricted to the narrow meaning urged by Defendant, and that the reasonable interpretation of the entire contract requires that Plaintiff recover his commissions.

From said judgment Defendant appealed to the Circuit Court of Appeals for the Seventh Circuit (Case No. 8842), and that Court concluded that an erroneous construction was placed upon the contract by the trial court, reversed the judgment, and remanded the cause "for further proceedings in

accordance with the opinion of this Court." (R.2-8). The mandate of that Court was as follows:

> "* * * It is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court filed this day.
>
> * * *
>
> "You, therefore, are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said judgment notwithstanding. Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, the Thirtieth Day of April, in the year of our Lord one thousand nine hundred and Forty-seven." (R. 7-8).

After the mandate was sent down to the District Court, Plaintiff's counsel ascertained from the Clerk of said District Court that the case would be re-docketed for a new trial. Defendant, however, moved for judgment in its favor on the basis of the mandate. In opposition to said motion Plaintiff contended that the mandate does not limit the power of the District Court to the mere perfunctory and ministerial act of entering judgment in favor of the Defendant, and that Plaintiff is entitled to a new trial and a trial by jury, with the right to amend his complaint, re-frame his pleadings, introduce new evidence, and to submit for the consideration of said Court certain new points of law not previously raised in or considered by either the District Court or the Circuit Court of Appeals, and also certain important questions and issues that were left open and undecided by the Circuit Court of Appeals. After oral arguments and submission of written

briefs, the District Court (per Igoe, D. J.) granted Defendant's motion for judgment in its favor, directed the Clerk to enter judgment in favor of the Defendant, and decreed "that the plaintiff herein take nothing by his suit, and that the defendant recover from the plaintiff its costs to be taxed by the clerk of this Court and that execution issue therefor." (R. 11). Plaintiff's motion to re-tax the court costs in the sum of $4,269.33 was denied by the District Court. (R. 22).

From the judgment of the District Court in favor of the Defendant and taxing against the Plaintiff as costs the premiums paid by Defendant for its supersedeas appeal bond, Plaintiff again appealed to the Circuit Court of Appeals for the Seventh Circuit, which Court affirmed the judgment of the District Court, and held that Plaintiff is not entitled to a new trial. (R. 57-61).

Jurisdictional Statement

It is contended that the Supreme Court has jurisdiction to review the judgment herein in question under and by virtue of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229 (28 U. S. C. A. Section 347 (a)).

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on June 2, 1948 (R. 61), and the petition for rehearing was denied on July 13, 1948 (R. 68). On motion of Petitioner, the Supreme Court, on October 8, 1948, extended the time for filing the petition for writ of certiorari in this cause to and including November 25, 1948.

The Questions Presented

1. Upon reversal of judgment in favor of Plaintiff and remand of the cause to the District Court for further pro-

ceedings in accordance with the opinion of the Circuit Court of Appeals, may final judgment be summarily entered in favor of Defendant without granting a new trial and trial by jury, and without affording to Plaintiff an opportunity to amend his complaint, re-frame his pleadings, introduce new evidence, raise certain new points of law not previously considered by either Court, and present certain questions and issues that were left open and were not adjudicated by the Circuit Court of Appeals?

2. Upon reversal of judgment in favor of Plaintiff and remand of the cause to the District Court for further proceedings in accordance with the opinion of the Circuit Court of Appeals, was the District Court warranted, under the mandate in question, to summarily enter judgment in favor of Defendant without granting a new trial and trial by jury, and without affording to Plaintiff an opportunity to amend his complaint, re-frame his pleadings, introduce new evidence, raise certain new points of law not previously considered by either Court, and present certain questions and issues that were left open and were not adjudicated by the Circuit Court of Appeals?

3. Where the District Court tries a breach of contract case without a jury, makes findings of fact, and decides in favor of Plaintiff on a particular theory, and the Circuit Court of Appeals concludes that the judgment for Plaintiff cannot be sustained on the trial court's theory, reverses judgment, and remands the cause to the District Court for further proceedings in accordance with its opinion, is Plaintiff thereby precluded from a new trial and trial by jury, with the right to amend his complaint, re-frame his pleadings, introduce new evidence, raise certain new points of law not previously considered by either Court, and present certain questions and

issues that were left open and undecided by the Circuit Court of Appeals?

4. Where both the District Court and Circuit Court of Appeals, in deciding a breach of contract case, disregarded the law of Ohio, which admittedly governs the contract in suit, is not the Plaintiff entitled, upon remand of the cause to the District Court, to urge said Court to consider his right to recover in the light of the law of Ohio?

5. Where the Circuit Court of Appeals reverses judgment in favor of Plaintiff upon a certain point that was not previously raised by Defendant in the District Court, and the case was not tried on that issue, is not the Plaintiff entitled, upon remand of the cause to the District Court, to an opporunity to be heard on that point?

6. Where the District Court tries a breach of contract case without a jury, makes certain findings of fact, and decides in favor of Plaintiff, may the Circuit Court of Appeals deny to Plaintiff a new trial and trial by jury by disturbing the trial court's findings of fact and by basing its decision in favor of Defendant upon certain assertions of fact that are not supported by the evidence?

7. Are sums of money paid by the Defendant for premiums on its supersedeas appeal bond properly taxable as costs against the Plaintiff?

8. Can a rule of the District Court afford a legal basis for taxing as costs against the Plaintiff the sums of money paid by the Defendant for premiums on its supersedeas appeal bond?

9. Does a reasonable interpretation of Rule 20 of the District Court warrant the taxing as costs against the Plaintiff of the sums of money paid by the Defendant for premiums on its supersedeas appeal bond?

Reasons Relied On for Allowance of The Writ

1. The decisions of the District Court and Circuit Court of Appeals deny to Plaintiff the right of trial by jury in violation of Amendment 7 of the United States Constitution.

2. The decisions of the District Court and Circuit Court of Appeals deny to Plaintiff an opportunity to be heard in violation of the Due Process Clause of the United States Constitution.

3. The decisions of the District Court and Circuit Court of Appeals disobey the express mandate of this Honorable Court as expressed by Chief Justice Fred M. Vinson (R. 8).

4. The decisions of the District Court and Circuit Court of Appeals are in conflict with the decisions of the United States Supreme Court.

5. The decisions of the District Court and Circuit Court of Appeals are in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

6. The decisions of the District Court and Circuit Court of Appeals override the Rules of Civil Procedure for the Federal District Courts, promulgated by the United States Supreme Court.

7. The decisions of the District Court and Circuit Court of Appeals fail to accord full faith and credit and comity to the laws of Ohio and the decisions of the court of last resort in that State.

8. The District Court and Circuit Court of Appeals have decided an important federal question in conflict with decisions of the United States Supreme Court.

9. The District Court and Circuit Court of Appeals have decided an important question of local law in conflict with applicable decisions of the courts of Illinois.

10. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

Prayer

Wherefore, your Petitioner, E. E. Swalley, prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket Number 9505, E. E. Swalley, Plaintiff-Appellant, vs. Addressograph-Multigraph Corporation, Defendant-Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgments herein of said Circuit Court of Appeals, and the District Court be reversed, and the cause remanded to the District Court for a new trial, and your Petitioner prays for such other and further relief as to this Court may seem proper.

Dated this the 22nd day of November, 1948.

HARRY B. COHEN,
DOUGLAS ARANT,
Birmingham, Alabama,
Counsel for Petitioner E. E. Swalley.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of The Courts Below

The original opinion of the United States District Court for the Northern District of Illinois, Eastern Division, written by District Judge Michael L. Igoe, appears on pages 325-329 of the Record in Case No. 1072 of the United States Supreme Court, and is not yet reported in the Federal Supplement.

The original opinion of the Circuit Court of Appeals for the Seventh Circuit, written by Circuit Judge Sherman Minton, appears on pages 2-8 of the present Record, and is reported in 158 Fed. (2nd) 51.

The District Court did not file a separate written opinion when it entered judgment in favor of Defendant upon remand of the case, but its order or judgment appears on pages 11-12 and 22 of the Record.

The opinion of the Circuit Court of Appeals for the Seventh Circuit, on the second appeal, appears on pages 57-61 of the Record, and is reported in 168 Fed. (2nd) 585.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347 (a)).

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on June 2, 1948 (R. 61), and the petition for rehearing was denied on July 13, 1948 (R. 68). On motion of Petitioner, the Supreme Court, on October 8, 1948, extended the time for filing the petition for

writ of certiorari in this cause to and including November 25, 1948.

Statement of The Case

To avoid unnecessary repetition, the Petitioner respectfully directs the attention of this Honorable Court to the Summary Statement of Matters Involved on pages 2-4 of the Petition for Writ of Certiorari, which is annexed hereto and made a part hereof.

Specification of Errors

It is respectfully submitted that the Circuit Court of Appeals for the Seventh Circuit and the District Court erred in the following particulars, separately and severally:

1. In rendering final judgment in favor of Defendant without granting a new trial.

2. In rendering final judgment in favor of Defendant without affording to Plaintiff an opportunity to have the case re-tried by a jury.

3. In rendering final judgment in favor of Defendant without affording to Plaintiff an opportunity to amend his complaint and re-frame his pleadings.

4. In rendering final judgment in favor of Defendant without affording to Plaintiff an opportunity to introduce new evidence.

5. In rendering final judgment in favor of Defendant without affording to Plaintiff an opportunity to raise certain new points of law not previously considered by either Court.

6. In rendering final judgment in favor of Defendant without affording to Plaintiff an opportunity to present for consideration of the Court certain questions and issues that

were left open and were not adjudicated by the Circuit Court of Appeals.

7. In rendering final judgment in favor of Defendant without affording to Plaintiff an opportunity to be heard with respect to the question of contract modification, which was not pleaded by Defendant and was not an issue in the trial of this case, but which was the basis of the original decision of the Circuit Court of Appeals.

8. In wrongfully usurping the functions of the trial court by disturbing the findings of fact by the District Court and making certain assertions of fact that are not supported by the evidence.

9. In failing to accord full faith and credit and comity to the statutes, laws, and decisions of the State of Ohio, which admittedly govern the contract in suit.

10. In denying to Plaintiff the right of trial by jury in violation of Amendment 7 of the United States Constitution.

11. In denying to Plaintiff due process of law in violation of the United States Constitution.

12. In disobeying the express mandate of the Supreme Court as expressed by Chief Justice Fred M. Vinson (R. 8).

13. In affirming the judgment of the District Court in favor of Defendant.

14. In failing to distinguish between the effect of a reversal and of an affirmance as a final adjudication of the merits.

15. In failing to distinguish between the effect of findings of fact by the trial court and the effect of a stipulation of facts by the parties.

16. In construing the mandate in question as requiring

the District Court summarily to enter judgment in favor of Defendant.

17. In denying to Plaintiff an opportunity to establish his cause of action and right to recover on grounds not in conflict with the original decision of the Circuit Court of Appeals, nor in conflict with the mandate of said Court.

18. In taxing as costs against the Plaintiff the sums of money paid by Defendant for premiums on its supersedeas appeal bond.

19.In holding that Rule 20 of the District Court affords a legal basis for taxing as costs against the Plaintiff the sums of money paid by Defendant for premiums on its supersedeas appeal bond.

20. In holding that a reasonable interpretation of Rule 20 of the District Court warrants the taxing as costs against Plaintiff of the sums of money paid by Defendant for premiums on its supersedeas appeal bond, amounting to $3,500.00.

21. In failing to reverse the judgment of the District Court in favor of Defendant and remand the cause for a new trial.

ARGUMENT

Summary of Argument

I.

Plaintiff is Entitled to a New Trial, and a Trial by Jury, with an Opportunity to Amend his Complaint, Re-Frame his Pleadings, Introduce New Evidence, Raise Certain New Points of Law Not Previously Considered by Either Court, and Present Certain Questions and Issues that were Left Open and Were Not Adjudicated by the Circuit Court of Appeals.

A. The mandate, judgment, and opinion of the Circuit Court of Appeals on the first appeal did *not* require *summary* disposition of the case in the District Court by entry of judgment in favor of Defendant.

B. Decisions of United States Supreme Court, Circuit Courts of Appeals of other circuits, and Illinois courts uniformly hold that the trial court is under *a legal duty* to grant a new trial under the circumstances of this case.

C. Logic and justice require a new trial.

D. The Courts below disregarded certain basic legal principles entitling Plaintiff to a new trial.

E. The decision of the Circuit Court of Appeals under review is based upon weak authority and specious reasoning.

F. Plaintiff can establish his cause of action and right to recover in this case if given an opportunity to do so.

II.

Sums of Money Paid by Defendant for Premiums on a Supersedeas Appeal Bond are Not Properly Taxable as Costs Against Plaintiff.

A. A reasonable interpretation of Rule 20 of the District Court does *not* warrant the taxing of Defendant's supersedeas appeal bond premiums as costs against Plaintiff.

B. If Rule 20 of the District Court is so construed as to include Defendant's supersedeas appeal bond premiums, said Rule is illegal and invalid.

I.

Plaintiff is Entitled to a New Trial, and a Trial by Jury, with an Opportunity to Amend his Complaint, Re-Frame his Pleadings, Introduce New Evidence, Raise Certain New Points of Law Not Previously Considered by Either Court, and Present Certain Questions and Issues that were Left Open and Were Not Adjudicated by the Circuit Court of Appeals.

Petitioner desires to make it clear, at the outset, that in urging a new trial he does not seek to circumvent the original decision of the Circuit Court of Appeals (R. 2-6) as "the law of the case" on the facts *as then presented*, nor is it his desire or intention to re-litigate the matters which were adjudicated on the first appeal. Petitioner respectfully contends, however, that the decisions of the District Court and of the Circuit Court of Appeals denying a new trial and denying Plaintiff the opportunity to be heard on matters not previously considered deprive Plaintiff of the right to trial by jury and due process of law guaranteed by the United States Constitution, override the Federal Rules of Civil Procedure, and are in direct conflict with decisions of this Court, with decisions of Circuit Courts of Appeal of other circuits, with former decisions of the same Circuit Court of Appeals, and with decisions of the Illinois courts.

A. The Mandate in question did *not* direct the entry of a specific judgment, nor did the Court *render* judgment in favor of Defendant. It should be noted that the mandate required further proceedings according to "right and justice, and the laws of the United States," and *notwithstanding* the judgment of reversal.

In its original opinion (R. 2-6), the Circuit Court of Appeals placed a certain construction on the agency contract which was at variance with that of the District Court. Nothing contained in the opinion, judgment, or mandate of the Court, however, required or commanded the District Court to dispose of the case *summarily* by entering judgment in favor of Defendant, or to deprive Plaintiff of a new trial and trial by jury. Nor can the opinion, judgment, or mandate of this Court be reasonably so construed as to warrant the action of the District Court.

B. The authorities relied upon, *infra*, clearly and uniformly hold that pursuant to a mandate and decision like that in the case at bar the trial court cannot properly dispose of the case *summarily*, but *must* grant a new trial and permit the amendment of the complaint, the re-framing of pleadings, the introduction of new evidence, and *must* consider plaintiff's cause of action on the basis of new points of law, and on issues not passed upon by the appellate court.

C. Indeed, the evil and incongruity of any other course are so apparent that fundamental concepts of justice as well as pragmatic logic compel adherence to these judicial precedents.

Suppose that a plaintiff can establish his cause of action by proving X, Y, or Z. The trial court, conceiving that X is decisive and has been proved, holds in favor of plaintiff. The appellate court, however, decides that the judgment cannot

be supported on that particular point or ground, and accordingly reverses and remands the case. Can it be reasonably contended that because the trial court placed its decision on a certain ground which the appellate court considered untenable, plaintiff is thereby precluded from any further hearing and barred from proving Y or Z?

Suppose that a plaintiff sues for breach of contract. The defendant contends that X, an immaterial point, is decisive of the case. The trial court decides the case on the false issue raised by defendant, but holds adversely to defendant. The appellate court decides that the trial court erred, reverses the judgment and remands the case. Can it be reasonably contended that plaintiff is thereby barred from any further hearing, that his case must rest solely on point X because that was the basis of the trial court's decision, that he cannot rely for recovery on any other ground, and that he is precluded from showing that point X is immaterial or rendered nugatory by certain new evidence or new points of law not previously considered or adjudicated?

In view of the fact that the original judgment of the District Court was in Plaintiff's favor, obviously Plaintiff could not have appealed from said judgment, regardless of the Court's reasoning, and even though the decision was based on certain points which were false issues raised by Defendant, and were not essential to Plaintiff's recovery. The original decision of the Circuit Court of Appeals that the conclusions of the District Court were erroneous eliminated those particular grounds as a basis for Plaintiff's recovery, but certainly could not preclude Plaintiff's recovery on other grounds. The fortuitous circumstance that the District Court selected as a basis of its decision a certain theory which the Circuit Court of Appeals considered untenable cannot prevent Plaintiff from establishing his cause of action and right of recovery on another theory.

D. The authorities relied on, infra, affirm certain basic principles of law which Petitioner submits were not duly considered by the Courts below:

(1) There is a well-recognized distinction between the effect of an *affirmance* and of a *reversal*. An *affirmance* is an adjudication by the appellate court that none of the claims of error are well-founded, and in that sense is decisive of the whole law of the case. A *reversal*, on the other hand, is not adjudicative of any questions other than those actually discussed and decided by the reviewing court, and does *not* settle the law of the case *as to issues not before the reviewing court and not discussed or considered by it.*

(2) The trial court was under a *legal duty* to grant a new trial and had no discretion in the matter.

(3) The waiver of a jury trial upon the *first* trial does *not* preclude a jury trial upon the *second* trial.

(4) *Findings of fact* by the trial court do *not* have the same effect as a *stipulation* of facts by the parties.

Decisions of United States Supreme Court

In *Gospel Army v. Los Angeles*, 331 U. S. 543, this Court declared:

> "In California, an unqualified reversal without direction to the trial court is effective to remand the case 'for a *new trial* and places the parties in the same position as if the case had never been tried.' (Citing California cases). "* * * In this case, however, the facts have not been stipulated, nor are there any special procedural restrictions. Thus, under California law, the Gospel Army, on the *second trial* to which it is entitled, *may amend its complaint and* present new facts." (Italics supplied).

In *Chase v. United States*, 256 U. S. 1, 65 L. ed. 801, this Court held that a reversal is not adjudicative of any questions other than those actually discussed and decided by the reviewing court, and does not settle the law of the case as to issues not before the reviewing court and not discussed or considered by it.

In *Sprague v. Ticonic National Bank*, 307 U. S. 583, 83 L. ed. 1184, this Court declared:

> "While a mandate is controlling as to matters within its compass, on remand a lower court is free as to other issues." (Citing cases).

Slocum v. New York Life Insurance Company, 228 U. S. 364, 57 L. ed. 879, was an action on a life insurance policy. A jury trial resulted in a verdict for plaintiff, and the District Court rendered judgment thereon. The Circuit Court of Appeals reversed and directed judgment for defendant on the evidence. The Supreme Court held that the Circuit Court of Appeals should not have directed judgment for defendant, but should have directed a *new trial* in view of Amendment 7 of the United States Constitution, and that when the verdict was set aside on appeal, there arose the same right of trial by jury as in the first trial. The Court stated:

> "When the verdict was set aside, the issues of fact were left undetermined, and until they should be determined anew, no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a *new trial, with the same right to a jury as before.*" (Italics supplied).

In *Hartford Life Insurance Company v. Blincoe*, 255 U. S. 129, 65 L. ed. 549, it was held that a reversal on specified grounds is not the law of the case as to a question presented by

the briefs of counsel but not considered or passed upon by the reviewing court.

District of Columbia v. McBlair, 124 U. S. 320, 31 L. ed. 449, held:

> "* * * The decree in question *reversed* the decree of the special term of August 7, 1875, and *remanded* the cause to the special term to be further proceeded with as the parties might be advised. *It did not direct dismissal of the petition of the District of Columbia, and was, therefore, not a final adjudication upon its right to some relief in accordance with the prayer of the petition.*" (Italics supplied).

In *General Investment Co. v. Lake Shore & N. S. R. Co.*, 260 U. S. 261, 67 L. ed. 244, this Court again pointed out that a decision of an appellate court must *not* be construed as an adjudication of matters which the court was not called upon to decide.

In *re Sanford Fork & Tool Company*, 160 U. S. 247, 40 L. ed. 414, held that upon reversal and remand the trial court has full power to consider and determine any questions or matters which the decision and mandate of the reviewing court leave open and undecided, and that plaintiff has the *right* to file a replication and amend the pleadings to present more clearly the facts at issue between the parties.

In *Globe Liquor Company v. San Roman*, 332 U. S. 571, 92 L. ed. 227, decided by this Court on January 5, 1948, both parties had moved for a directed verdict in the trial court, and verdict was directed for plaintiff. Defendant failed to move for judgment under Rule 50 (b) of the Federal Rules of Civil Procedure. The Circuit Court of Appeals reversed and remanded with direction to enter judgment for defendants. The Supreme Court held it was error to direct the

District Court to enter judgment for defendants and that the case should be remanded to the District Court *for a new trial.*

Decisions of Circuit Courts of Appeals of Other Circuits

Indemnity Insurance Company of North America v. Levering, 59 Fed. (2nd) 719 (C. C. A. 9th), was an action at law wherein the jury was waived upon the first trial, special findings were made by the court, and judgment was rendered in favor of defendants. On the first appeal, the judgment was reversed and the mandate directed the trial court to proceed in conformity with the decision. On remand, the trial court denied a new trial and entered judgment in favor of plaintiff. On the second appeal, it was held that defendant was entitled to a *new trial,* and that a new trial generally follows on reversal of judgment where the reviewing court does not render final judgment nor expressly direct the entry of a specific judgment.

McNee v. Williams, 280 Fed. 95 (C. C. A. 8th), held that where the review touched only part of the issues, a reversal of plaintiff's judgment for further proceedings leaves the other issues open and does not require judgment for defendant.

In *White v. Higgins,* 116 Fed. (2nd) 312 (C. C. A. 1st), it was held that where an appellate court reverses and remands a case "for further proceedings not inconsistent with this opinion," and the opinion instructs the lower court on one point of law, that court is not precluded from adhering to its original decision in reliance on some *new point of law not previously considered in either the trial court or appellate court.*

Roth v. Hyer, 142 Fed. (2nd) 227, (C. C. A. 5th), cert. den. 323 U. S. 712, 89 L. ed. 573, held that a reversal and remand "for further and not inconsistent proceedings" requires a trial *de novo.*

In *Shell Petroleum Corp. v. Shore,* 80 Fed. (2nd) 785 (C. C. A. 10th), the Court declared:

> "Ordinarily, after a judgment has been reversed on appeal and the cause remanded, the case stands for *trial de novo,* on the issues properly joined." (Italics supplied).

In *National Bondholders Corp. v. Seaboard Citizens National Bank of Norfolk,* 110 Fed (2nd) 138 (C. C. A. 4th), it was held that a point not raised in the briefs on appeal and not considered in the reviewing court's opinion, could be considered by the District Court to which the case was remanded.

In *Eastman Kodak Co. v. Blackmore,* 277 Fed. 694 (C. C. A. 2nd), the Court assumed that the order "Judgment reversed" implies a new trial, for it stated at p. 699:

> "As we have no power to dismiss the complaint, and a new trial must be ordered, in accordance with *Slocum v. New York Life Ins. Co.,* 228 U. S. 364, * * * it may be well to call attention to another question presented upon this review."

In *Thane Lumber Co. v. J. L. Metz Furniture Co.,* 12 Fed. (2nd) 701 (C. C. A. 8th), it was held that the ruling on the prior appeal that certain memoranda were binding contracts was *not* the law of the case on re-trial after a change in the pleadings raising new issues, such as lack of the agent's authority.

In *Madden v. Metropolitan Life Insurance Company,* 127 Fed. (2nd) 837 (C. C. A. 5th), the Court held that

where a judgment was reversed and the cause remanded for further proceedings, a *new trial* should have been had with opportunity to *amend the pleadings and introduce new and additional evidence.*

To the same effect as the foregoing cases are the following:

Federal Reserve Bank of Philadelphia v. Ocean City, N. J., 93 Fed. (2nd) 519 (C. C. A. 3rd);

Miller's Mutual Fire Ins. Assn. of Ill. v. Bell, 99 Fed. (2nd) 289;

Illinois Power & Light Corp. v. Hurley, 48 Fed. (2nd) 681, cert. den. 284 U. S. 637, 76 L. ed. 541;

Thornton v. Carter, 109 Fed. (2nd) 316;

Wallace v. Seagraves, 51 Fed. (2nd) 143;

Newcomb v. Burbank, 182 Fed. 954;

Former Decisions of the Circuit Court of Appeals for the Seventh Circuit

In *Hawkins v. Cleveland, etc. Ry. Co.*, 99 Fed. 322 (C. C. A. 7th), the Court declared:

> "In the present case the decree below was reversed, but instead of a direction for the entry of any particular decree, the mandate was, as stated, that further proceedings should be had not inconsistent with the opinion of the court. The effect was to put the case in the same posture as if no decree had ever been entered, and in that situation the court had the same authority to permit an amendment of the petition or bill of the appellee for the purpose of enlarging the issue and of admitting further proofs as it had before the entry of the reversed decree. The case of *In re Sanford Fork & Tool Company*, 160 U. S. 247, * * * affords an apt precedent."

In *Illinois Bell Telephone Co. v. Slattery*, 98 Fed. (2nd) 930 (C. C. A. 7th), the Court stated:

> "The law seems to be well-settled that a lower court is free to determine any matter left open by the mandate of the higher court. Our attention is called to a number of authorities which sustain this principle." (Citing decisions of the United States Supreme Court).

In *Illinois Bell Telephone Co. v. Slattery*, 102 Fed. (2nd) 58 (C. C. A. 7th), the Court declared:

> "Admittedly, it is the duty of an inferior court to carry into execution the terms of the Supreme Court mandate, but it does not follow from this that the court is without jurisdiction to give consideration to any question left open by the mandate and opinion of such court."

In *Kaplan v. Joseph*, 125 Fed. (2nd) 602 (C. C. A. 7th), the Court stated:

> "* * * After reversal this decree was no longer of force and effect. The parties were in precisely the same situation as though no decree had been rendered."

Decisions of Courts of the State of Illinois

In *People ex rel. Shake v. Lord*, 315 Ill. 603, 146 N. E. 506, the Supreme Court of Illinois held that where a judgment in an ordinary suit at law, in which the parties are entitled to a jury trial, is reversed on appeal and the cause remanded generally, the parties are entitled to a *trial de novo*, and further that the waiver of a jury trial is exhausted by the first trial, and when the case is remanded *both parties are restored to their original right of trial by jury*, and any *stipulations* made on the former trial as to the facts are *not admissible* on the second hearing except by consent of the parties. The

Court, moreover, recognized the well-established distinction between the effect of an *affirmance* and of a *reversal.*

In *Kinney v. Lindgren,* 373 Ill. 415, the Supreme Court of Illinois declared, at p. 420:

> "* * * When a judgment is reversed and the cause remanded with directions to proceed in conformity to the decision then filed, and it appears from the opinion that the grounds of reversal are of a character to be obviated by amendment of the pleadings or by the introduction of additional evidence, the trial court is *bound* to permit the cause to be re-docketed and to permit such amendments and the introduction of further evidence on the new hearing." (Citing Illinois cases). (Italics supplied).

To the same effect as the foregoing cases are the following:

Koepke v. Schumacher, 328 Ill. App. 113, 65 N. E. (2nd) 224;

People ex rel. Cobine v. Angsten, 274 Ill. App. 5.

E. In support of its decision the Circuit Court of Appeals relied upon the following cases:

Goepfert v. City of Beach, 154 Fed. (2d) 743 (C. A. A. 8th);

City of Orlando v. Murphy, 94 Fed. (2d) 426 (C. A. A. 5th);

Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., 21 Fed. (2d) 692 (Dist. Ct., W.D., N.Y.).

It is respectfully submitted that these cases are not cogent authority for the decision under review and do not warrant the denial of a new trial in this case.

In the *Goepfert* case, the court stated:

> "* * * The declaration of the former opinion that the cause of action was barred by the *statute (of limitations)* was unequivocal and * * * it was not left open to the trial court to reopen the case at the plaintiff's instance to relitigate *that question.*" (Italics and parenthesis supplied).

As the cause of action in that case was barred by the statute of limitations, and that question was closed, it would obviously serve no useful purpose to retry the case on any other issues. That situation is entirely different from the case at bar, where the Plaintiff does *not* seek to relitigate the points decided by the Court, and the statute of limitations is not involved.

In the *City of Orlando* case, the court declared:

> "* * * The District Court should not permit the filing of, and the retrial of the case on, amendments *which do not go to remove the adjudged deficiencies in the cause of action.*" (Italics supplied).

It is thus implied by that decision that where the plaintiff proposes amendments which *would* remove the adjudged deficiencies in the cause of action, it would be *proper* for the trial court to permit the amendments.

The *Wenborne-Karpen* case was merely a decision of a district court, and even in that case the court declared:

> "* * Since the question of estoppel *was presented and argued to the appellate tribunal,* this court is devoid of power to do anything other than what is required to be done by the mandate." (Italics supplied).

That case is certainly no authority for denying Plaintiff a

new trial in regard to points of law, issues, or questions which had *not* previously been considered by or raised in either the trial court or appellate court.

Plaintiff cannot properly be denied a new trial on the theory that the decision in question involved merely "Propositions of Law," or that "it left undisturbed the trial court's finding of facts," or that it finally disposed of the case "on the merits." Applying such lump concepts to the precise narrow issues in the case at bar is like trying to pick up pearls with buttered gloves.

In the first place, the trial court's finding of facts did *not* embrace all of the issues in this case, but covered only those points which the trial court considered essential, *according to its own theory of the case.* As a matter of fact, the question of "use" and "storage" was a false issued raised by Defendant, *and Plaintiff is entitled to recover regardless of the interpretation of the word "use."* If the trial court could have foreseen the theory of the Circuit Court of Appeals, it undoubtedly would have made a finding of facts which would have been appropriate in the light of that theory.

Petitioner respectfully points out that the original opinion of the Circuit Court of Appeals (R. 2-6) contains certain assertions of fact which are *not* embraced in the trial court's finding of facts and are *not* supported by the evidence. Examples of such assertions of fact are:

(1) The so-called modification of the contract by a certain company bulletin. (R. 4).

As a matter of fact, the bulletin in question did not even apply to the purchase orders sued upon, and the company itself recognized this fact by its own actions and conduct, and deemed it necessary to issue a later bulletin.

(2) "The plaintiff's share in the commission was so large because he had the duty of installing the machines, training operators, and servicing the machines for a certain period of time." (R. 3).

(3) "The Middleton, Pennsylvania, transaction." (R. 4). For aught appearing from the record the machine had not remained at Middleton for the required period of ninety days.

(4) "The plaintiff made no objection to this interpretation or modification of the contract." (R. 4).

Moreover, the Circuit Court of Appeals did, in fact, *disturb* the trial court's finding of facts by assuming or hypothesizing certain facts in its so-called propositions of law.

For example, the proposition that "no sounder guide to the contract's meaning can be found than the interpretation of the parties themselves," is a salutary rule of law, but it is mis-applied when used by the Court to re-write a contract for the parties on a *mistaken assumption of facts.*

Likewise, the legal proposition that a contract terminable at will can be modified at any time by either party as a condition of its continuance, may be unquestioned as a principle of law, but it assumes or hypothesizes not only that the contract is terminable at will, but also that the contract was effectually modified and that the modification was a condition of its continuance. The trial court's findings of fact are devoid of any finding on those points and there is no support for them in the evidence.

The trial court found as a matter of fact and concluded as a matter of law that plaintiff had proved all of the material allegations of his complaint and the first four amendments thereto. Did not the Circuit Court of Appeals *disturb* said

finding of facts by ***disregarding*** the material allegations of the complaint and the four amendments thereto, and by predicating reversal upon certain grounds not covered by the trial court's opinion or findings of fact?

And did not the Circuit Court of Appeals ***disturb*** the finding of the trial court that the machines in question were actually being ***used*** by the Army as it saw fit?

F. This case ***cannot*** be summarily disposed of on the ground that the decision of the Circuit Court of Appeals was based "on the merits," as certain merits of this case entitling the Plaintiff to recovery ***were left open and undecided*** by that Court, and certain questions, issues, and points of law ***were not even raised in or considered by either Court.*** Under these circumstances, the authorities (cited herein) clearly hold that the Plaintiff is entitled to a ***new trial,*** and the Plaintiff humbly prays that this Court grant a new trial in order that Plaintiff may have an opportunity to be heard on the following matters, among others:

(1) Plaintiff is entitled to recover ***regardless*** of the interpretation of the word "use", because Plaintiff's rights to the commissions accrued under the contract when the machines were ***sold,*** he was entitled to receive payment when the machines were ***shipped,*** and his rights were never divested by operation of the ***condition subsequent*** of the 90-day clause of paragraph 8 of the contract, in which the word "use" appears.

(2) The law of Ohio, which admittedly governs the interpretation of the written contract in question, as well as the decisions of the United States Supreme Court and of the various Circuit Courts of Appeal, require that ambiguities in a written contract shall be construed most strongly against the party who drafted the contract, in this case the De-

fendant Company. Under the law of Ohio the word "use" is held to be one of the most comprehensive words in the English language and capable of being used in many senses. And under the law of Ohio the word "use" in a written contract has actually been construed against the party who drafted the contract and selected the terminology.

(3) By clear, convincing evidence, including documentary evidence, Plaintiff can prove that Defendant actually interpreted the contract as contended by the Plaintiff and that both parties acted in reliance thereon.

In a certain letter sent by Defendant to Plaintiff with reference to a similar transaction, Defendant made it clear beyond any doubt that in order for Plaintiff to be entitled to a commission on a machine it is *not* required that the machine be actually installed and operated.

Plaintiff can prove further that Defendant paid Plaintiff a commission on a machine which had been shipped pursuant to one of the purchase orders in question and had remained in his territory for 90 days, *even though it was not installed and operated during that period.*

Moreover, Plaintiff can prove that regularly twice a month he had submitted to Defendant, in compliance with Defendant's rules, certain "I & E" (Income and Expense) reports in which he claimed credit for commissions on all of the machines that were required to be shipped to Mobile Air Depot on the three purchase orders in question, and that the Defendant Company never disputed the correctness of said reports nor made any complaint concerning said reports.

Plaintiff did not have an opportunity to present the foregoing evidence at the first trial in view of the fact that his active duty with the United States Navy made it impossible for him to attend the trial in person, and his evidence

was submitted by deposition. Moreover, since *modification* was not pleaded by Defendant and the case was not tried on that issue, Plaintiff was not duly apprised of such defense, and consequently he did not have an opportunity to meet that point by the introduction of evidence.

(4) The Company bulletin relied upon by the Circuit Court of Appeals cannot afford a basis for an interpretation or so-called modification of the contract because said bulletin was *not even received by the Plaintiff.*

(5) Defendant has admitted in its pleadings and briefs that Plaintiff was entitled to receive commissions on machines *shipped to Mobile Air Depot "for storage"*, and hence Defendant's argument and the very pillar of the Court's decision collapsed therewith, as the *ultimate* installation and operation of the machines would have no effect one way or the other on Plaintiff's legal rights to the commissions *which had accrued and become vested upon the sale and shipment of the machines.* As Plaintiff's rights had already accrued and could not be divested except by operation of the *condition subsequent* of the 90-day clause (which, in fact, has no application to the present case), it is utterly immaterial whether the machines were ever placed in operation.

(6) Defendant is *estopped* by its own actions and conduct from claiming any interpretation or so-called modification of the contract at variance with Plaintiff's contention.

(7) The Ohio *Statute of Frauds* renders *null and void* the Company bulletin relied upon as a so-called modification of the contract, because said bulletin is not in writing signed by the Plaintiff, the party to be charged.

(8) The Company bulletin, upon which the Court predicated a so-called modification of the contract, did *not,*

in fact, apply to the transactions in question. It was restricted to mobile army units, that is, combat units of U. S. Engineers, and had no reference to the Air Corps or to the Air Depot at Mobile, Alabama. It dealt solely with Multilith, and not Multigraph machines. It was limited to shipments from the factory to Army General Depots, and did not cover shipments to Mobile (Alabama) Air Depot, which, in fact, is *not* an Army General Depot. Moreover, the bulletin refers to entirely different purchase orders having no bearing on this case, and the Defendant Company itself recognized the fact that the bulletin in question did not apply to the transactions in suit by later issuing another bulletin which purported to apply to one of the purchase orders in question, but said later bulletin was issued only after Plaintiff's commissions had already been earned.

(9) The so-called modification of the contract is also ineffectual for the following reasons, among others:

There was no new consideration moving to Plaintiff. Defendant failed to give written notice, as required by the contract, of its desire to terminate the contract. The continuation of the contract was *not* conditioned upon acceptance by Plaintiff of the terms of the bulletin in question. Plaintiff did not accept or assent to the terms of the bulletin. And, in any event, even considered as a notice of *partial* termination, the bulletin is a legal anomaly and devoid of legal validity.

(10) The contract in suit was *not* terminable at will, because of the bad faith and unjust enrichment of the Defendant Company.

(11) The Plaintiff acquired vested rights to the commissions in suit which could not be adversely affected by a purported modification of the agency contract.

Plaintiff respectfully submits that the foregoing questions, issues, and points of law, among others, were not previously considered or adjudicated by either Court, and the Plaintiff is entitled to an opportunity to be heard on these matters.

II.

Sums of Money Paid by the Defendant for Premiums On a Supersedeas Appeal Bond Are Not Properly Taxable Against the Plaintiff.

Rule 20 of the District Court provides as follows:

> "Bond Premiums—Taxable as Costs. If costs shall be awarded by the court to either or any party then the reasonable premiums or expense paid on all bonds or stipulations or other security given by that party in that suit shall be taxed as part of the costs of that party."

Plaintiff respectfully submits that under a fair and reasonable interpretation of said Rule the bond premiums referred to should not include premiums paid by Defendant on a *supersedeas* appeal bond. There is an obvious and important distinction between an ordinary appeal bond and a supersedeas appeal bond. The Defendant, if it so desired, could have filed an ordinary appeal bond in this case and obtained a review by the Circuit Court of Appeals just as effectively as by filing a supersedeas appeal bond. Instead, the Defendant elected to file a supersedeas appeal bond for its own peculiar benefit and convenience, in order to obtain a stay of execution of the judgment of the District Court. The stay of the judgment was a privilege afforded to the Defendant if it desired to go to the expense of furnishing a supersedeas appeal bond, but the expense of said bond should certainly not be taxed as court costs against the Plainstiff. In the case at bar the bond

premiums in question amounted to approximately $3500.00! Rule 20 was undoubtedly intended to cover the cost of the ordinary appeal bond, but can premiums of about $3500.00 on a supersedeas appeal bond be considered "reasonable premiums or expense" within the meaning of said Rule? Plaintiff urges this Court to consider said Rule in the light of reason and justice, and to so interpret the Rule as to eliminate from its operation premiums on a supersedeas appeal bond.

If this Court should be of the opinion that Rule 20, by its terms, covers premiums on a supersedeas appeal bond, Plaintiff respectfully submits that said Rule, so construed, is arbitrary, unreasonable, and unconstitutional, and should not be enforced in its application to the case at bar. The action of the District Court cannot be sanctioned by its own rule of court, if the rule in question deprives a litigant of private property without due process of law, denies to him the equal protection of the law, imposes upon him a penalty so severe and so oppressive that it operates, in effect, to obstruct justice and prevent free access to the court, and if said rule constitutes a wrongful usurpation of legislative authority.

Plaintiff is certainly an innocent and unwilling victim of Defendant's choice of filing a supersedeas appeal bond in this case. The District Court originally decided this case in favor of Plaintiff, and Plaintiff earnestly believes that he is still entitled to judgment in his favor and that upon a new trial of this cause he will be vindicated. But even if this Court should hold a contrary view, is it not manifestly unfair and unreasonable to impose upon Plaintiff the penalty of the supersedeas bond premiums because of the District Court's "erroneous" judgment? In any event, Defendant could have gained the advantage of staying the judgment and yet avoided the tremendous expense of a supersedeas appeal bond by

obtaining Plaintiff's consent or agreement to a stay of the judgment pending the appeal. This the Defendant did not choose to do. To avoid such an unjust result, Plaintiff urges this Court to hold Rule 20 illegal and invalid as applied to the present case.

The following cases have held that the bond premiums were not taxable as costs against the unsuccessful appellant.

Lee Injector Mfg. Co. v. Penberthy Injector Co., 109 Fed. 964.

Parkerson v. Borst, 256 Fed. 827.

Kroger Grocery and Baking Co. v. Martin, 97 Fed. (2d) 348, cert. den. 305 U. S. 631, 83 L. ed. 405, 59 Sup. Ct. 95.

Re Hoyt, 119 Fed. 987.

The Willowdene, 97 Fed. 509.

The Governor Ames, 187 Fed. 41, 48.

The Texas, 226 Fed. 897, 905.

In the absence of any statute authorizing the Court to tax said costs against the Plaintiff, Plaintiff contends that such action is unwarranted.

CONCLUSION

Your Petitioner humbly prays that a writ of certiorari be granted in this cause, that the judgments of the Courts below be reversed, and that the case be remanded to the District Court for a new trial, in order to afford the Petitioner an opportunity to establish his cause of action and right of recovery against the Defendant, "according to right and justice, and the laws of the United States."

Respectfully submitted,

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Birmingham, Alabama
Counsel for Petitioner,
E. E. SWALLEY.

Birmingham, Alabama,
November 22, 1948.

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1948

No. 432

E. E. SWALLEY, PETITIONER-PLAINTIFF,

V.

ADDRESSOGRAPH-MULTIGRAPH CORPORATION, RESPONDENT-DEFENDANT.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable the Supreme Court of the United States:

STATEMENT.

A. Introduction.

This is the second time that petitioner-plaintiff has sought a writ of certiorari in this case. Petitioner-plain-

tiff's first petition for a writ of certiorari was filed in the October Term, 1946, as Case No. 1072, and on that occasion certiorari was denied (*E. E. Swalley* v. *Addressograph-Multigraph Corporation*, 330 U. S. 845, 67 Sup. Ct. 1086, 91 L. Ed. 1290).

The petitioner's summary statement is entirely inadequate and is confusing. Because petitioner devotes a portion of his brief to challenging the correctness of the original decision in this case by the Circuit Court of Appeals (158 Fed. [2d] 51), and which challenge was previously made in the first petition for writ of certiorari, which was denied by this Court, we have undertaken to again restate the facts of this case so that the Court will not be required to examine the briefs of the former certiorari proceedings. The references to the record referred to in this Statement are to the record in the prior certiorari proceedings, Case No. 1072.

With respect to the record in the present proceeding, there was served on attorneys for respondent a purported transcript of record which starts with printed page numbered 33 and runs to printed page numbered 70, inclusive. References in petitioner's brief indicated that the record filed with the Court contains additional pages numbered 1 to 32, and the Clerk of this Court has advised that this is the fact. This portion of the transcript has not been served upon respondent or respondent's attorneys. This omission was directed to petitioner's attention by the respondent at the time of service. (See notations by respondent on proof of service filed by petitioner in the office of the Clerk of this Court.)

It would seem that the failure to properly serve a complete copy of the transcript on respondent would be grounds for denying certiorari (see *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 90 L. Ed. 1099). In view of the shortness of time within which to prepare this reply brief, we are not informed as to the full contents of the transcript of record on file in the Clerk's office and, therefore, have been required, when referring to the record in the present proceeding, to assume that certain of the earlier proceedings are in the record, but the reference has necessarily had to be without identifying the page numbers in the transcript where such proceedings appear.

B. Facts.

(References are to record in Case No. 1072)

The petitioner was employed as a Sales Agent for respondent in March of 1941 for the state of Alabama and certain enumerated counties in Florida. He resigned his employment in March of 1943. The petitioner brought this action to recover, among other things, commissions which he alleged to have been due him under the Sales Agency Contract on sales to the United States of America, War Department, Air Corps, covered by three purchase orders Nos. 42-15979, dated March 31, 1942 (R. 281); No. 42-19531-P, dated May 18, 1942 (R. 289); and No. 42-19532-P, dated May 20, 1942 (R. 295).

The petitioner's cause of action as contained in his complaint sought the entire commission on the products covered by the above described War Department purchase orders, but on the trial of the case, the evidence

established that these War Department purchase orders were not procured by the petitioner, but were procured by the respondent's Sales Agent in Dayton, Ohio. The trial court found that the petitioner had not made the sales and denied the petitioner the entire commission, as claimed, and the petitioner took no appeal from this decision. The trial court, however, found that the petitioner was entitled to 75% of the entire commission on these three purchase orders, based on the sale by the respondent's Sales Agent in Dayton, Ohio. The respondent took an appeal from this judgment and the Circuit Court of Appeals, in reversing the judgment of the District Court, held that the petitioner was not entitled to any portion of the commission on these three orders.

The Agency Contract (R. 246) contained a provision providing for the splitting of the entire commission where the sale was made by an agent in one territory, but the equipment sold was "for use" or "to be used" in another agent's territory. Under such circumstances the contract provided that 25% of the entire commission would be payable to the agent making the sale, and 75% of the entire commission to the agent in the territory where the equipment was to be used (Par. 8 of the Contract, R. 248).

It is to be noted that this provision is contrary to the ordinary commission contract where the entire commission is paid to the agent actually making the sale, regardless of where the equipment sold is actually used. The reason for this variation from the ordinary commission contract and the justification for giving 75% of the entire commission to an agent who participated in no way in making the sale, and in whose territory the sale

was not made, is explained by the fact that the agent in whose territory the machines are to be used has the expense of installing these machines, training the customer's employees in the operation of the machines and servicing the machines for the customer as such service is required (R. 54, 58, 59, 62, 63, 64, 66, 173-175, 199-200). The respondent's standard order form which was used by all agents and by this petitioner during all times he was employed by the respondent and which each agent, including this petitioner, was required to sign at the time that an order was taken, contained a clause wherein the agent is required to state the place where the equipment will be "kept and installed" (R. 312; R. 316).

Prior to October of 1941, the War Department began making substantial purchases of equipment on their own special forms calling for delivery to Army Depots for temporary storage. The machines, when delivered to these Depots, were not required to be installed or maintained, nor was there any requirement for the training of operators, since these obligations would not arise until the machines were reshipped from the Depots to some activity for actual use. The respondent, to remove any doubt as to the right to commissions on such sales, issued a bulletin to all of its agents, including the petitioner, dated October 31, 1941, which provided in part as follows:

> "2. When equipment is shipped from factory to an Army Depot, it is considered as 'in transit' and Sales Agent in whose territory that General Depot is located will be entitled to no commission and quota credit, for obviously such equipment will not be installed for use at the Depot, and War Department will decide where that equipment is to go.

"3. On shipments where final destination is not known, as to General Depots, the 75% share of the commission will be carried on company's books as a liability and paid later when it is definitely ascertained who is entitled to this commission." (Respondent's Ex. 18, R. 309.)

The three purchase orders from the War Department, Army Air Force, involved in this case as above noted were not received until March 31, 1942, May 18, 1942 and May 20, 1942, respectively. They were obtained by the respondent's Sales Agent at Dayton, Ohio, which was outside the petitioner's territory, and the respondent's Dayton agent was paid 25% of the entire commission (R. 152, 192). The officers who executed the purchase orders on behalf of the War Department had never dealt with or heard of the petitioner (R. 141, 142). The purchase orders called for shipments of equipment to six Army Depots located throughout the United States, only one of which was the Mobile Depot which was located in petitioner's territory. The Army Air Force intended that the shipments to the Depots were for the purposes of temporary storage until such a time as the equipment would be needed at the various air fields, air bases and training centers for use therein, at which time the equipment would be reshipped to such activities (R. 140). The equipment, when it reached the Mobile Air Depot, was not removed from its original shipping crates (R. 137). The final disposition and use of this equipment remained under the control of the Air Service Command at Dayton, Ohio, who ordered the reshipment of this equpment from the temporary storage Depots to the activity at which the equipment would be used (R. 138). Under such order from the Air Service Command, some of the equipment covered by the above described

three purchase orders was reshipped from the Mobile Depot to the air bases, etc., located in petitioner's territory, which equipment was installed by petitioner for use and he thereupon claimed and was paid 75% of the entire commission, or a total of $6,324.94. As to the other machines shipped under the above described three purchase orders to the Mobile Depot (which storage Depot supplied five states which were not included in petitioner's territory [R. 136-137]), these machines were installed by the agents in territories other than petitioner's and they were paid the remaining 75% of the entire commission. The commission which the petitioner claims in this case is on the equipment sold under the above described three purchase orders, which was temporarily stored in its original shipping crates in the Mobile Depot and thereafter, on direction of the Air Service Command at Dayton, Ohio, reshipped out of the Mobile Depot and into the territory of other Sales Agents of respondent and by them installed for use in their territories.

A short time after the above described three purchase orders from the War Department had been obtained in Dayton, petitioner learned of the orders and telephoned Mr. Hitchcock, a Sales Manager of the Multigraph Division of respondent, and during that conversation asked Mr. Hitchcock if petitioner would get a commission on any machines that remained in storage in the Mobile Depot for ninety (90) days, to which Mr. Hitchcock replied that he would not; that commissions on these machines would be paid when they were installed for use (R. 160, 115, 126); and Mr. Hitchcock further stated that the machines were shipped into the Depot for storage and for all practical purposes were in transit and

"that the work had to be done after the machines were sent to the activity and installed for use, and that in fairness to all our other men who really had to do the work, and in line with the way we had handled similar situations that was the way we were going to handle this" (R. 161). Petitioner made no protest nor expressed any objection or disagreement with this statement.

Shortly after shipments were being started under the above described three purchase orders of the War Department, a second bulletin was issued to the agents under date of September 21, 1942, reiterating the manner of distribution of commissions on such orders as stated in the October 31, 1941, bulletin (Def. Ex. 7, R. 302). This bulletin also set up a procedure for the agents to follow in making requests for commissions when machines covered by the above described three War Department purchase orders were actually installed. The petitioner expressed no objection or disagreement with the terms of this bulletin and subsequently made claims for commissions on the forms provided for machines covered by the above described three War Department purchase orders for machines actually installed by him in his territory; and petitioner made no request for commissions on any machines which were merely in temporary storage in the Mobile Depot (R. 43, 117). In one instance, the petitioner claimed and was paid a commission on a machine which was covered by one of the above described three War Department purchase orders which had been originally shipped to the Middleton Army Depot (which was located outside petitioner's territory) and was subsequently reshipped from that Depot into petitioner's territory and installed by him therein (R. 298). Under the theory advanced by

petitioner for recovery in this case, that commission should have been payable to the agent in whose territory the Middleton Depot was located but, nevertheless, the petitioner claimed and was paid this commission in the sum of $1,075.00 (R. 100, 101, 298).

The respondent furnished petitioner monthly statements on which were shown all of the debits and credits to petitioner's account each month, including commissions credited, and each commission credit was supported by an invoice identifying the particular transaction for which the commission was paid (R. 210, 217). The petitioner was given credit for 75% of the entire commission on all machines covered by the above described three purchase orders which were installed by him for use in his territory (R. 219), but petitioner was not given credit for any commission on machines shipped to the Mobile Depot for storage (R. 219). The petitioner never objected to the balance of his account as shown on each of these monthly statements (R. 220) * * * and never, at any time during his employment, made any claims for commissions on machines which were not installed in his territory (R. 43,117), although petitioner did not resign until March of 1943 (R. 105).

C. Chronology of This Case.

1. Suit was filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, and the case was tried to the District Judge under a written stipulation waiving a jury. The Judge made findings of fact and conclusions of law and ordered judgment for the petitioner.

2. Respondent appealed to the United States Circuit Court of Appeals for the Seventh Circuit, which court found that the contract was not ambiguous and that "since an erroneous construction was placed upon this contract by the trial court, the judgment is reversed and the cause remanded to the District Court for proceedings in accordance with this opinion." This opinion is reported in 158 F. (2d) 51, and we assume it is also incorporated in the present record.

3. After petition for rehearing was denied by the United States Circuit Court of Appeals, petitioner filed a petition for writ of certiorari and a brief in support thereof in this Court. See Case No. 1072. This Court denied the petition for certiorari (330 U. S. 845, 67 Sup. Ct. 1086, 91 L. Ed. 1290).

4. After the denial of the petition for certiorari, the mandate of the United States Circuit Court of Appeals for the Seventh Circuit was forwarded to the Clerk of the District Court and thereafter respondent filed a motion for judgment in accordance with the mandate. The petitioner filed no motions, applications or pleadings in the District Court, but after respondent had filed its motion for judgment and before the District Court had ruled thereon, the petitioner filed a motion in the United States Circuit Court of Appeals for the Seventh Circuit and filed a brief in support thereof whereby the petitioner sought to have the Circuit Court of Appeals either (1) clarify its mandate in respect to the jurisdiction and power of the trial court to grant a new trial or rehearing, and/or (2) modify its original mandate so as to confer jurisdiction and power upon the trial court, or issue a special mandate directing the trial court to grant

a new trial or rehearing. The Circuit Court of Appeals denied the petitioner's motion and thereafter, on June 24, 1947, the District Court entered a judgment in favor of the respondent. (The respondent's motion in the District Court for judgment, the petitioner's motion in the Circuit Court for clarification of mandate, and the District Court's judgment should be included in the transcript in the present case.)

5. The order of the District Court of June 24, 1947, further provided that "the defendant recover from the plaintiff its costs to be taxed by the Clerk of this court." On June 27, 1947, the respondent presented its verified bill of costs which it proposed the Clerk tax, and gave petitioner notice that application would be made to the Clerk to tax the same on July 1, 1947. The petitioner filed on July 2, 1947, his answer to motion of respondent, opposing and contesting the motion of respondent "to tax as court costs the amounts paid for premiums on the supersedeas appeal bond," and presented his points and brief in support of said answer. Thereafter, on July 2, 1947, the Clerk taxed the costs as shown in said verified bill of costs. On July 7, 1947, the petitioner filed a motion requesting the court to retax the costs, and respondent filed a counter-motion that the court tax the costs as entered by the Clerk. On September 10, 1947, the District Court overruled the petitioner's motion and sustained the respondent's motion for a judgment, and a judgment for costs in the amount of $4,269.33 was entered (all of these proceedings were included in the transcript before the Circuit Court of Appeals and should be in that portion of the transcript of record in this case which was not included in the transcript served upon respondent).

6. Petitioner appealed to the United States Circuit Court of Appeals for the Seventh Circuit from the order of the District Court of June 24, 1947, which entered the order for judgment in favor of the respondent. The judgment was affirmed. The opinion is reported in 168 F. (2d) 585 and appears on pages 57 to 61 in the record filed in connection with this petition.

7. Thereafter, petitioner filed a petition for rehearing in the Circuit Court, which was denied, and the matter is now presented to this Court on the petition for writ of certiorari to review the judgment of the Circuit Court of Appeals last entered.

ARGUMENT.

The decision of the Circuit Court of Appeals which is found in 168 F. 2d 585, appears at pages 57 to 61 in the record filed in connection with this petition. A consideration of the grounds upon which the opinion of the Circuit Court of Appeals was based discloses clearly that there are no questions presented in the petition for writ of cetiorari of such character as to require determination by this Court, and that the petition fails to present any recognized ground for the exercise of the jurisdiction of this Court under the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347(a)).

I. The Circuit Court of Appeals Properly Stated the Law That, Where the Case is Tried by the Court Under a Written Stipulation Waiving a Jury and the Trial Court Makes Findings of Fact Which are Undisturbed on Appeal but Reverses the District

Court on a Proposition of Law, Upon Remand the District Court May Properly Enter Judgment That the Petitioner Take Nothing by His Complaint and the Respondent Recover Its Costs.

The Circuit Court of Appeals, in reversing the judgment of the District Court, did so on a proposition of law (see original opinion 158 F. 2d 51).

Any doubt that might exist as to the basis for the reversal in the first opinion was entirely eliminated in the second opinion of the Circuit Court of Appeals reported in 168 F. 2d 585 and found in the present record at page 57, wherein the court said at page 58:

> "The appeal to this Court in the first cause was from a judgment of the District Court after a trial at which a jury had been waived and in which the court had made findings of fact and stated its conclusions of law thereon. The findings of fact fully sustained the allegations of the complaint and were practically undisputed. We did not disturb the findings of fact. We disagreed with the District Court as to a proposition of law, namely, the construction of the contract sued upon. The District Court was reversed for that reason and that only. There was no question of fact involved, nor did we rule on the admissibility or nonadmissibility of the evidence, and, as the case was tried to the court, there was no question on instructions. The fact-finding process was in no manner affected. Where, as here, the cause is tried by the court, a jury having been waived, and the court makes findings of fact which fully cover the allegations of the plaintiff's complaint and which findings are sustained by the evidence and are in no manner disturbed on appeal and only a question of law is decided, upon remand there is nothing left to try, and the District Court

properly entered judgment that the plaintiff take nothing by his complaint and that the defendant recover its costs."

Under the circumstances existing in this case, it has been uniformly held that there is no violation of the Seventh Amendment to the United States Constitution, as contended by the petitioner, in entering judgment for the respondent, and this principle has been recognized in the following decisions of this Court:

City of Fort Scott v. *Hickman*, 112 U. S. 150, 164, 165, 28 L. Ed. 636, 641.

Allen v. *St. Louis National Bank*, 120 U. S. 20, 40, 30 L. Ed. 573, 578.

Cleveland Rolling Mill Co. v. *Rhoades*, 121 U. S. 255, 264, 30 L. Ed. 920, 923.

Redfield v. *Parks*, 132 U. S. 239, 252, 33 L. Ed. 327, 332.

Stanley v. *Schwalby*, 162 U. S. 255, 282, 40 L. Ed. 960, 969.

This Court has denied petitions for writs of certiorari in the following cases in which the Circuit Court of Appeals, under similar circumstances, had held that the petitioner was not entitled to a new trial after a reversal in the Circuit Court of Appeals.

City of Orlando v. *Murphy*, 94 F. (2d) 426; Cert. denied 299 U. S. 580; 81 L. Ed. 427.

Consolidated Products Co. v. *Blue Valley Creamery Co.*, 97 F. (2d) 23; Cert. denied 305 U. S. 629; 83 L. Ed. 403.

Herzberg's, Inc. v. *Ocean Accident & Guarantee Corporation*, 132 F. (2d) 438; Cert. denied 306 U. S. 645; 83 L. Ed. 1044.

And even in cases tried to the jury where the trial court improperly refused to sustain the defendant's motion for a directed verdict and a subsequent motion for a judgment notwithstanding the verdict, this Court has held that upon reversal plaintiff is not entitled to a new trial and that such a decision does not violate the Seventh Amendment to the Constitution:

Baltimore & Carolina Line v. *Redman*, 295 U. S. 654; 79 L. Ed. 1636.

And where the Circuit Court of Appeals reverses and directs a new trial where the reversal is based upon propositions of law, this Court, in *National City Bank of New York City* v. *Oelbermann*, 301 U. S. 48; 81 L. Ed. 918, ordered that:

> "the judgment is modified by substituting a direction for a judgment of dismissal on the merits with costs in place of the direction for a new trial and as so modified is affirmed. Baltimore & C. Line v. Redman, 295 U. S. 654, 79 L. Ed. 1636, 55 S. Ct. 890."

Compare *Forged Steel Wheel Co.* v. *Lewellyn*, 251 U. S. 511; 64 L. Ed. 381.

The earlier cases of this Court establishing this rule have been uniformly followed in the Circuit Courts of Appeals and in the District Courts.

See

Goepfert v. *City of Beach*, 154 F. (2d) 743.
Wenborne-Karpen Dryer Co. v. *Cutler Dry Kiln Co.*, 21 F. (2d) 692.
Thornton v. *Carter*, 109 Fed. (2d) 316.
U. S. v. *Illinois Surety Co.*, 226 Fed. 653.

II. The Circuit Court of Appeals Stated in its Opinion That the Entry of the Judgment for the Respondent by the District Court was in Accordance with the Mandate of the Circuit Court of Appeals. This is a Complete Answer to Petitioner's Argument that the Action of the District Court Was Not In Conformity With the Mandate of the Circuit Court of Appeals.

On page 150 of petitioner's brief, petitioner contends that the action of the District Court in entering the judgment which it entered was not in conformity with the mandate and the opinion of the Circuit Court of Appeals issued and rendered at the time of the first appeal in this case (for this opinion see 158 F. 2d 51). This question, however, has been entirely eliminated from the case by the second decision of the Circuit Court of Appeals (168 F. 2d 585) (R. 57-61) holding that the District Court had properly construed its mandate. The court said in this regard:

> "In such a case, the only proceeding the District Court could have taken was to enter the judgment it entered upon our mandate. We did not by our mandate order a new trial; in fact, we declined to do so when we overruled the plaintiff's motion to modify and clarify our mandate. In this kind of a case, tried without the intervention of a jury, where the findings of fact are in no manner disturbed and only a question of law decided, we undoubtedly have the power to direct the District Court to enter the very order which it entered in this cause. *Thornton* v. *Carter*, 109 F. 2d 316, 319; *Consolidated Products Co.* v. *Blue Valley Creamery Co.*, 97 F. 2d 23. This we did not specifically do, but our opinion and mandate left no discretion to the District Court to do other than it did do. If the Dis-

> trict Court had any discretion in the matter, which we do not think it had, the plaintiff did not invoke the discretion of the District Court by tendering any amended pleadings to that court as the basis for granting him a new trial. Indeed, it has been held in a case similar to this one that the granting of a new trial even after the tender of amended pleadings was contrary to the mandate and therefore error. *Herzberg's Inc.* v. *Ocean Accident & Guarantee Corporation, Ltd.*, 132 F. 2d 438. The District Court correctly applied the mandate of this Court."

In making the above statement the Circuit Court of Appeals had in mind that the District Judge found for the petitioner in the first instance on the theory that the words "for use" or "to be used" in the contract would include machines which were merely stored in petitioner's territory while in transit to their ultimate destination outside of petitioner's territory (see District Judge Igoe's opinion, page 324 of Record in case No. 1072). In the first appeal the Circuit Court of Appeals did not agree with the District Court Judge's definition of the words "use" or "to be used" in the contract, and said:

> "The words 'use' and 'to be used' in Section 8 of the contract are employed in no different sense. We think that the contract is not ambiguous and that the words 'use' and 'to be used' are to be given their ordinary meaning, 'to employ; * * * to put into operation; to cause to function.' See Webster's New International Dictionary, Second Edition, 1941. The words 'use' and 'to be used' as employed in this contract are not synonymous with storage."

Upon remand to the District Court, District Judge Igoe was bound to follow the interpretation of the Circuit Court of Appeals and there was, therefore, nothing for

him to do but to enter judgment for defendant because the only commissions in controversy were those covered under the provisions of this contract, which provisions were defined by the decision in the Circuit Court, and as so defined defeated petitioner's claim.

III. The Additional Grounds Upon Which Petitioner Claims He is Entitled to a New Trial Were Presented to the Circuit Court of Appeals on Several Occasions and were Presented to this Court in Petitioner's First Petition for Certiorari, Which This Court Denied.

The petitioner states on page 14 of his brief that it is not his desire or intention to relitigate the matters which were adjudicated on the first appeal; however, the grounds which petitioner asserts entitle him to a new trial (see pages 28 to 31, under point F, Petitioner's Brief), indicate clearly that this is exactly what petitioner desires to do. All of these points have been previously presented for consideration at one time or another to the Circuit Court of Appeals and to this Court in the following manner:

(1) Motion for leave to file a petition for rehearing and in the brief filed in support thereof, all of which was filed with the Circuit Court of Appeals subsequent to the filing of the first opinion in this case by the Circuit Court of Appeals.

(2) Petition for writ of certiorari filed in this Court complaining of the first opinion of the Circuit Court of Appeals in this case, said petition being in case No. 1072. At that time respondent filed a reply to the petition for certiorari, which reply answered

the grounds then and now relied upon (pages 8 to 23 of Respondent's Brief—case No. 1072). Since the court denied that petition for certiorari, we will not burden the Court with a restatement of what was said in that reply brief.

(3) Motion for clarification or modification of the mandate and brief in support thereof filed by the petitioner with the Circuit Court of Appeals.

(4) Brief of petitioner filed with the Circuit Court of Appeals for the Seventh Circuit on the second appeal to that court, from the judgment of the District Court which had been entered in accordance with the mandate.

It is presumptuous for petitioner to assume that all of these matters which he now again urges in his present petition for writ of certiorari have not been considered by the courts to whom they were presented. Since the points upon which petitioner relies have been presented and found to be without merit, we submit this Court should again come to the same conclusion.

The practice of re-presenting the same issues over and over again by repeated appeals was properly condemned in the case of *Thornton* v. *Carter*, 109 F. 2d 316, in the following language:

> "There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

IV. The Premiums on Supersedeas Bonds are Properly Taxable as Costs in the District Court of the United States for the Northern District of Illinois, Eastern Division.

It has been a long established principle that the District Court has the power to establish by its rules of court what disbursements shall be taxed as costs.

Williams v. *Sawyer Bros.*, 51 F. 2d 1004, 1005.
W. F. & John Barnes Co. v. *International Harvester Co.*, 145 F. 2d 915, 917; 7 C. C. A.
Parkerson v. *Borst*, 256 Fed. 827.
The Texas, 226 Fed. 897.

The rules of court promulgated by the District Court of the United States for the Northern District of Illinois, Eastern Division, from which court this appeal was taken, provide in part as follows:

> "Rule 20. Bond Premiums—Taxable as Costs. If costs shall be awarded by the court to either or any party then the reasonable premiums or expense paid on all bonds or stipulations or other security given by that party in that suit shall be taxed as a part of the costs of that party."

Since the District Court has the power to establish by its rules the disbursements that shall be taxable as costs, and since the District Court did by rule provide that all bond premiums should be taxed as costs, the judgment of the District Court was clearly right in assessing such disbursements as costs.

The petitioner argues that Rule 20 was intended to cover only "an ordinary appeal bond" and not a "supersedeas appeal bond." The language of Rule 20 leaves

no ground for such an argument. The title is "Bond Premiums—Taxable as Costs." This is not limited to certain particular types of bonds, but is general and unqualified in its scope. In the body of the rule in speaking of the premiums which may be assessed as costs the rule refers to "the reasonable premiums * * * paid on *all* bonds." In the face of this language it is doubtful if petitioner is serious in his contention. Even if the rule were incomplete or ambiguous the courts would interpret it to include the premium on all types of bonds filed in the cause. In the case of *Williams* v. *Sawyer Bros.*, (51 F. 2d 1004), the issue was the right of the District Court to tax as costs premiums paid on an attachment bond. While it was shown that it had been the practice of the court to assess as costs premiums on certain types of bonds, the evidence showed that the premium on this type of bond had never been assessed as costs. The court held that the existence of the usage and practice of assessing as costs premiums paid on certain type of bonds esablished "a general usage which comprehends *all* cases where surety company bonds are required, either to release property, or as to any other kind of security."

Petitioner in his brief, at pages 32, 33 and 34, suggests that the filing of the supersedeas bond by the respondent at the time of its appeal from the adverse decision first rendered by the District Court was a voluntary choice by the respondent for its own special benefit, and that respondent could have gained the advantage of staying the judgment without the expense of a supersedeas appeal bond by merely obtaining the petitioner's consent or agreement to a stay pending the

appeal, and that "this the defendant did not choose to do." The petitioner neglects to mention that he made a motion to require the respondent to file a stay of execution bond, and that the court entered an order that the "execution would be stayed only until March 28, 1945, without bond" (petitioner should have included this in the transcript of record filed in this case; however, it may be found in the record in the previous case No. 1072, page 342).

The record further shows that the stay bond and supersedeas bonds on which the premiums were taxed were filed under orders of the District Court (if petitioner did not include these orders in the present record they can be found at pages 342 and 352, respectively, in the record of case No. 1072).

The argument is further answered in the case of *Land Oberoesterreich* v. *Gude,* (93 F. 2d 292), wherein the court said, "It was the erroneous judgment obtained by the plaintiff that made it necessary for the defendants to obtain a supersedeas or run the risk of having the judgment collected by the plaintiff. We think defendants ought not to be required to run the risk of making such a payment and seeking a refund if the judgment should later be held to have been erroneously rendered. In other words, the premiums ought to be regarded as a reasonably necessary expense of the appeal."

The cases cited by petitioner as alleged authority for the proposition that such premiums are not properly taxable as costs were all from jurisdictions wherein there were no rules of court which made such disbursements

taxable costs. As already stated, that is not the case here and, therefore, those cases are not in point. The cases cited by petitioner are referred to in *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 68 L. Ed. 909, as follows:

> "In Lee Injector Mfg. Co. v. Penberthy Injector Co. (C. C. A. 6th Cir.) 48 C. C. A. 760, 109 Fed. 964; The Gov. Ames (C. C. A. 1st circuit) 109 C. C. A. 94, 187 Fed. 40, 48; The Texas (C. C. A. 3d circuit) 226 Fed. 897, 905; Parkerson v. Borst (C. C. A. 5th circuit) 168 C. C. A. 173, 256 Fed. 827; Re Hoyt, 119 Fed. 987 (D. C.); and in The Willowdene, 97 Fed. 509 (D. C.), it is held that where the disbursement is not made as the result of any rule of practice, and there is no statute, rule, or usage by which it is made a part of the taxable costs of the case, it cannot be allowed. In The Texas (C. C. A. 2d circuit) 226 Fed. 897, 905, the circuit court of appeals of the third circuit, after expressing its approval of the view that a rule of court or a practice equivalent thereto is necessary to justify the taxation of such costs, said:
>
> > "But we may also say that we think such a rule or practice has become so desirable that we feel confident the court below will take an early opportunity to conform its procedure in this respect to the custom prevailing in other districts."

CONCLUSION.

Much of the petitioner's argument is devoted to matters not pertinent to the grounds for granting certiorari as cited in the petition, and in view of the inhibition of Rule 38, we have refrained from discussing such matters.

We respectfully submit there is no reason for the exercise by this Court of its power to grant a writ of certiorari.

Respectfully,

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